91-336

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARL H. SCOTT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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August 1991

QUESTION PRESENTED

Whether Petitioner's conviction for carnal knowledge of a female under the age of sixteen years, in violation of 10 U.S.C. § 920(b) (Supp. 1989), which offense can be committed solely by a male, violated Appellant's right to equal protection of the law under the Fifth Amendment to the Constitution, where he could have been charged with a functionally equivalent gender neutral offense of "sexual abuse of a minor" under 18 U.S.C. § 2243 (Supp. 1989).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Carl H. Scott, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 4, 1991.

OPINIONS BELOW

The United States Coast Guard Court of Military Review issued its decision on February 19, 1991, which is reported at 32 M.J. 644 (C.G.C.M.R. 1991) (Appendix A). On June 4, 1991, the United States Court of Military Appeals granted Petitioner's petition for grant of review and affirmed the decision of the Court of Military Review. —— M.J. —— (C.M.A. 1991) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on June 4, 1991. The jurisdiction

of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1989) and 10 U.S.C. § 867(h) (Supp. 1989).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

On October 4 and 5, 1989, Petitioner, a Seaman Radioman, pay grade E-3, in the Coast Guard was tried by a general court-martial, convened at the office of Commander, Fifth Coast Guard District, in Portsmouth, Virginia. Pursuant to his pleas, Petitioner was convicted of several offenses, the most serious being "carnal knowledge" of a 14 year old female, in violation of Article 120(b), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920(b) (Supp. 1989).[1] Petitioner was sentenced to be reduced to pay grade E-1, to forfeit all pay and allowances, to be confined for two years, and to be discharged from the service with a bad conduct discharge.

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[1] On the evening of June 26, 1989, Petitioner returned to his quarters on a Navy base, after consuming a substantial amount of alcoholic beverages. After bantering with the 14 year old babysitter, he suggested that she remove her T-shirt so that he might view her breasts. She complied. Thereafter, both went upstairs to the master bedroom where they engaged in consensual intercourse, which was interrupted when Petitioner's wife returned unexpectedly.

Petitioner argued before the Coast Guard Court of Military Review that conviction under 10 U.S.C. § 920(b) violated the right to equal protection afforded him by the Fifth Amendment to the Constitution. Although addressing this issue specifically, the Court of Military Review affirmed the conviction and sentence on February 19, 1991. On June 4, 1991, the United States Court of Military Appeals affirmed that decision without discussion.

REASONS FOR GRANTING THE WRIT

I

This case involves underlying issues of apparent abuse of prosecutorial discretion in the charging of Petitioner, the effectuation of Congressional intent as expressed in its revision of Title 18, United States Code, and, most significantly, whether male soldiers, sailors, and airmen are to be treated as second class citizens under the *Uniform* Code of Military Justice. (emphasis added) Similarly situated male and female members of the Armed Forces, who allegedly commit offenses under the Uniform Code of Military Justice, should be treated equally, but are not. Accordingly, good cause exists to grant this petition because the Court of Military Review and the Court of Military Appeals, to the substantial prejudice of Petitioner, erred in holding that Article 120(b), UCMJ, 10 U.S.C. § 920(b) (Supp. 1989), as applied, does not violate Appellant's right to equal protection of the law under the Fifth Amendment to the Federal Constitution. Moreover, as this issue has not been raised previously, it is one which should be decided by this Honorable Court, especially so because other provisions of the Uniform Code of Military Justice suffer from the same Constitutional infirmity, *e.g.*, Article 120(a), 10 U.S.C. § 920(a) (Supp. 1989) [rape].

II

Petitioner pled guilty to, and was convicted of, the offense of "carnal knowledge" under Article 120(b), UCMJ, 10 U.S.C. § 920(b) (Supp. 1989), which provides:

> "Any person subject to this chapter [Chapter 47, Title 10, United States Code] who, under circumstances not amounting to rape, commits an act of sexual intercourse with a female not his wife who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct."

10 U.S.C. § 920(b) is very similar to the California "statutory rape" law, § 261.5 of the California Penal Code Annotated. This statute provides:

> "[u]nlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."

In a plurality decision, this Honorable Court upheld the California statute against attack based upon the Equal Protection Clause of the Fourteenth Amendment, rejecting the argument that the statute illegally discriminates by making only men susceptible of prosecution and conviction. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981).

Alhtough it contains no Equal Protection Clause as does the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment provides equivalent protection from discriminatory actions on the part of the Federal Government. *Mathews v. de Castro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). *See also* decision below, *United States v. Scott*, 32 M.J. 644, 646-647 (C.G.C.M.R. 1991).

Upon comparison of the "carnal knowledge" provision of 10 U.S.C. § 920(b), with the "statutory rape" provision of the California Penal Code Annotated, § 261.5, it would appear that the decision in *Michael M. v. Superior Court of Sonoma County* forecloses any equal protection attack on the former. Nevertheless, Petitioner submits that, in light of subsequent Federal legislation, *Michael M. v. Superior Court of Sonoma County* readily may be distinguished, and that his conviction should be held to be violative of his right to equal protection of the law.

III

The proper "test" in deciding whether a classification based on gender is violative of equal protection is whether such classification serves important Governmental objectives and is substantially related to the achievement of those objectives. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

In Petitioner's case, with respect to the first "prong" of this "two-pronged" test, the Court of Military Review "judicially noted the worthy objectives cited by the Government as fully justifying the gender classification in Article 120(b), UCMJ." *See* decision below, *United States v. Scott*, 32 M.J. 644, 649 (C.G.C.M.R. 1991). It respectfully is submitted that the Court of Military Review erred in judicially noting *any* of the purported "worthy objectives," since there is absolutely no evidence that the Congress even remotely had them in mind when enacting the "carnal knowledge" provision of the UCMJ in 1950.[2]

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[2] In a "Supplemental Brief of the Government," Appellate Government Counsel submitted to the Coast Guard Court of Military Review excerpts from the House of Representatives hearings on the Uniform Code of Military Justice. These excerpts revealed that the *only* objective in enacting the "carnal knowledge" provision was to create a so-called "statutory rape" provision, which was to be the same for all of the Armed Forces and was intended simply to

IV

With respect to the "second prong" of the test, and unlike the State of California in *Michael M. v. Superior Court of Sonoma County*, the Coast Guard did not have to charge Petitioner with a gender biased offense in order to prosecute him. The alleged offense occurred in Government (Navy) housing onboard U.S. Naval Security Group Activity, Northwest, Chesapeake, Virginia, which location presumptively is within the "special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 7(3) (Supp. 1989).[3] Accordingly, pursuant to Article 134, UCMJ, 10 U.S.C. § 934 (Supp. 1989)[4] and

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criminalize sexual intercourse between consenting females under the age of 16 years and *male* service members. It respectfully is submitted that none of the myriad "worthy objectives" found by the Coast Guard Court of Military Review can be discerned in the scant legislative history of this provision. *Cf. United States v. Johnson*, 17 M.J. 251 (C.M.A. 1984) (United States Court of Military Appeals questioned the validity of the holding in *United States v. Sykes*, 11 M.J. 766 (N.M.C.M.R. 1981), that the gender based classification in an indecent assault charge under Article 134, UCMJ, 10 U.S.C. § 934, does serve important Governmental objectives and is substantially related to the achievement of those objectives. 17 M.J. at 253 n.3); *Country v. Parratt*, 684 F.2d 588 (8th Cir.), *cert. denied*, 459 U.S. 1043, 103 S.Ct. 461, 74 L.Ed.2d 612 (1982) (without adequate evidence of record, an appellate court must attempt to infer what important governmental objectives are served by a gender based criminal statute, but may not rely upon a "sexual stereotype").

[3] 18 U.S.C. § 7 provides:

"The term 'special maritime and territorial jurisdiction of the United States', as used in this title, includes:

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

[4] Article 134, UCMJ, 10 U.S.C. § 934 (Supp. 1989) provides:

"Though not specifically mentioned in this chapter [Chapter 47, Title 10, United States Code], all disorders and neglects to the

18 U.S.C. § 2243 (Supp. 1989),[5] Petitioner could have been charged with the gender neutral offense of "sexual abuse of a minor."

18 U.S.C. § 2243 (Supp. 1989) provides, in pertinent part:

> "(a) [Sexual abuse] Of a Minor. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who—
>
> (1) has attained the age of 12 years but has not attained the age of 16 years; and
>
> (2) is at least four years younger than the person so engaging;
>
> or attempts to do so, shall be fined under this title, imprisoned not more than five years, or both."

This provision is gender neutral, and Congress enacted it with this equal protection improvement specifically in mind. *See* H.R. REP. No. 594, 99th Cong., 2d Sess. 12 (1986).[6]

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prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

See also Part IV, ¶ 60c(4), Manual for Courts-Martial, United States 1984 (MCM, 1984) (Appendix C). The Manual for Courts-Martial is issued pursuant to the President's authority under Article 36, UCMJ, 10 U.S.C. § 836 (Supp. 1989).

[5] Enacted as one provision of the "Sexual Abuse Act of 1986," added Nov. 10, 1986, Pub. L. 99-646, § 87(b), 100 Stat. 3621 and Nov. 14, 1986, Pub. L. 99-654, § 2, 100 Stat. 3661.

[6] "Current Federal law is *gender-biased* and incomplete in the protection it offers from sexual abuse. *Only females can be victimized* . . . H.R. 4745 is drafted broadly to cover the widest possible variety of sexual abuse, and *to prevent both males and females from that abuse.*" (FN41) (emphasis added).

FN41. "Thus, a female can be victimized by a male or a female, and a male by a male or a female . . ." H.R. REP. No. 594, 99th Cong., 2nd Sess. 12 (1986).

Aside from being gender neutral, 18 U.S.C. § 2243 also affords an accused significant additional protections not afforded by 10 U.S.C. § 920(b). First, it creates what might be termed a "young lovers" exception, *viz.*, the requirement for "at least four years" difference in ages. To illustrate, an 18 year old Coast Guard Seaman who engages in sexual intercourse with his 15 year old girlfriend may be tried and convicted under 10 U.S.C. § 920(b), for carnal knowledge. Under 18 U.S.C. § 2243, no offense has even been committed. (Of course, if the roles were reversed, *i.e.*, if the Seaman were a female and the 15 year old, her boyfriend, *she* could not even be charged under 10 U.S.C. § 920[b]!) Second, subsection (c) of the latter statute specifically provides that "it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years." Contrast this with the proscription applied to the defense case under 10 U.S.C. § 920(b). "It is no defense that the accused is ignorant or misinformed as to the true age of the female . . . it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility." Part IV, ¶ 45c(2), MCM, 1984 (Appendix D). Finally, the disparity in maximum punishments is enormous. As stated, 18 U.S.C. § 2243 provides for a fine and imprisonment for "not more than five years, or both." The maximum punishment for carnal knowledge under 10 U.S.C. § 920(b), is "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years." Part IV, ¶ 45e(2), MCM, 1984.

V

The Court of Military Review also erred in simply relying upon this Honorable Court's decision in *Michael M. v. Superior Court of Sonoma County*, and three Ninth Circuit cases, to dismiss Petitioner's Constitutional challenge. *See United States v. Scott*, 32 M.J. 644, 648

(C.G.C.M.R. 1991). In so doing, the Court of Military Review disregarded the fact that *all four cases were decided before* Congress amended the Federal "statutory rape" law to make it gender neutral.

VI

Gender biased criminal statutes have been justified by a court's not considering the offense "in a vacuum but, instead, [by looking] to the entire statutory scheme." *United States v. Johnson*, 17 M.J. 251, 253 (C.M.A. 1984), *citing Country v. Parratt*, 684 F.2d 588, 591 (8th Cir.), *cert. denied*, 459 U.S. 1043, 103 S.Ct. 461, 74 L.Ed.2d 612 (1982) and *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 476, 101 S.Ct. 1200, 1208, 67 L.Ed.2d 437 (1981) (Stewart, J., concurring). In *this* case, had the Court of Military Review looked carefully at the *entire* statutory scheme, *viz.*, 10 U.S.C. § 934, and 18 U.S.C. §§ 7 & 2243, it would have come to the conclusion that the Government could [and should] have avoided charging Petitioner with the gender biased offense of "carnal knowledge" under 10 U.S.C. § 920(b).

VII

Implicit in this Honorable Court's decision in *Michael M. v. Superior Court of Sonoma County*, is the rationale that a statute which criminalizes only sexual activity between adult males and younger females does not deny equal protection, because there is no societal interest in criminalizing such activity between adult females and younger males. To the contrary, as established by the research reported in Appendix E, under comparable circumstances boys also are subject to severe harm, with the potential for significant long term societal costs, including child molestation. Accordingly, there is not even a "rational basis" for treating adult females who engage in sexual activity with boys any differently than adult males who engage in sexual activity with girls.

CONCLUSION

Upon a close reading of *Michael M. v. Superior Court of Sonoma County*, it is apparent that even the members of this Honorable Court who joined in the plurality opinion upholding the California statute were troubled by the State legislature's failure to pass a gender neutral statute. *See Michael M. v. Superior Court of Sonoma County, supra*, n.10, 101 S.Ct. at 1207.[7] Nevertheless, the Court was not willing to *require* the State to enact a gender neutral statute in order to satisfy equal protection requirements. *Id.*[8] In Petitioner's case, the crux of the equal protection argument is that Congress *already had enacted* a gender neutral carnal knowledge provision, one that would satisfy the concerns of *all* of the members of the Court. Petitioner could have been charged under that provision. Yet, inexplicably, the Government elected to proceed on the one provision, 10 U.S.C. § 920(b), which

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[7] Similarly, Judge Bridgman of the Coast Guard Court of Military Review, in his concurring opinion in the decision below, was "disturbed by the reach of Article 120, UCMJ, [10 U.S.C. § 920] which is clearly sexually biased." *See United States v. Scott*, 32 M.J. 644, 650.

[8] Interestingly, even the Commonwealth of Virginia, in which the alleged crime occurred, has seen fit to gender neutralize its own carnal knowledge provision. *See* § 18.2-63, Code of Virginia, which provides:

"If any person carnally know, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.

Provided, however, if such child be thirteen years of age or older but under fifteen years of age and consents to the carnal knowledge and the accused be a minor and such consenting child is three years or more the accused's junior, the accused shall be guilty of a Class 6 felony, but if such consenting child is less than three years the accused's junior, the accused shall be guilty of fornication.

In calculating whether such child is three years or more a junior of the accused minor, the actual dates of birth of the child and the accused, respectively, shall be used.

For the purposes of this section a child under the age of thirteen years shall not be considered a consenting child."

most offends notions of "equal protection" under the Constitution. It is this decision, to prosecute under 10 U.S.C. § 920(b), which it respectfully is submitted, utterly fails to satisfy the "second prong" of the test set forth in *Michael M. v. Superior Court of Sonoma County. Cf. Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (A prosecutor, consistent with the principles of equal protection, may not use his power to "strike" members from a venire in a racially discriminatory fashion).

Certainly, this Honorable Court may take judicial notice of the recent hostilities in the Persian Gulf. During the course of "Operation Desert Shield," hundreds of thousands of American military personnel were sent to the theater of operations. Among them were many female members, both officer and enlisted. During the succeeding "Operation Desert Storm," both the men and the women did their duty and achieved a stunning victory. Yet, despite their training together, working together, living, and, tragically, dying together, they served under some laws which discriminate based solely upon gender. One of these is Article 120(b) of the Uniform Code of Military Justice. Although Petitioner is not seeking to have this provision declared unconstitutional on its face, he does submit that this is an appropriate case for this Honorable Court to declare that the Government must treat both male and female military members equally, whenever that may be accomplished without harm to the needs of the military.

Finally, regardless of what the "important Governmental objectives" [first prong] might be (if indeed there are any), how can it be concluded that prosecution under a gender biased statute, rather than a functionally equivalent gender neutral one, "is substantially related to the achievement of those objectives [second prong]?" *All* of the "objectives" (even the ones judicially noted by the Court of Military Review) could be achieved equally by prosecution under 18 U.S.C. § 2243.

It respectfully is submitted that the Government has not, and cannot, satisfy this "prong" of the test. Accordingly, it respectfully is prayed that this Petition for a Writ of Certiorari be granted, that Petitioner's conviction for violation of 10 U.S.C. § 920(b) be set aside, and the case returned to the Court of Military Appeals for further proceedings.

Respectfully submitted,

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August 1991

APPENDICES

APPENDIX A

UNITED STATES COAST GUARD
COURT OF MILITARY REVIEW
Washington, DC

UNITED STATES

v.

CARL H. SCOTT
SEAMAN RADIOMAN, U.S. COAST GUARD

CGCM 0028

Docket No. 939

19 FEBRUARY, 1991

General Court-Martial convened by Commander, Fifth Coast Guard District, Portsmouth, Virginia. Tried at the Office of the Commander, Fifth Coast Guard District, Portsmouth, Virginia on 4-5 October 1989.

Military Judge: Capt. Douglas A. Smith, USCG

Trial Counsel: Cdr. Stephen R. Campbell, USCG

Assistant Trial Counsel: Lt. Christopher Abel

Detailed Defense Counsel: Lt. Kevin Collins, USCG

Civilian Defense Counsel: Anthony J. Nocolo, Esquire

Appellate Defense Counsel: Cdr. Terrance M. Edwards, USCG

Appellate Government Counsel: Cdr. Richard T. Buckingham, USCG

BEFORE
PANEL ONE
BAUM, BRIDGMAN AND SHKOR
Appellate Military Judges

Baum, Chief Judge:

This case presents a scene of marital infidelity as old as history itself: an aggrieved spouse walking in unexpectedly on the mate and a partner *flagrante delicto*. Here, the wife, a Coast Guard petty officer, returned home prematurely from Coast Guard duties to find her husband, the accused, in bed with the 15 year old baby sitter. The ensuing angry confrontation prompted the accused to flee, drive away in an inebriated state, and remain absent from home and work for 13 days. In the process of his rapid departure, the wife, who blocked the accused's exit, was knocked aside, resulting in a charge of assault, in violation of Article 128, UCMJ. The accused was also charged with unauthorized absence for the 13 days he was gone and for operating a motor vehicle while drunk in violation of Articles 86 and 111, UCMJ.

He pled guilty to these offenses, as well as to a specification alleging an earlier failure to go to his appointed place of duty, and to a wrongful use of cocaine specification which was alleged to have occurred on the last day of his 13 days absence. These offenses were in violation of Articles 86 and 112(a), UCMJ. The accused also pled guilty to one specification of communicating indecent language to a child under 16, in violation of Article 134, UCMJ, by asking the baby sitter to expose her breasts. Based on his pleas, appellant was convicted of all offenses. He has not challenged these findings. He has, however, attacked the findings of guilty for the one remaining offense, to which he also pled guilty, carnal knowledge of the 15 year old baby sitter, in violation of Article 120, UCMJ. He has also taken issue with the adjudged sentence based on the *ratio decidendi* of *U.S. v. Roach*, 26 MJ 859 (CGCMR 1988), aff'd 29 MJ 33 (CMA 1989). That sentence, a bad conduct discharge, confinement for two years, forfeiture of all pay, and reduction to pay grade E-1, was approved by the convening authority as falling within the terms of the pretrial agreement. The

assignments of error, which have been orally argued to the Court, are as follows:

I

APPELLANT'S PLEA TO COMMITTING THE OFFENSE OF CARNAL KNOWLEDGE WAS IMPROVIDENT BECAUSE CONVICTION UNDER ARTICLE 120(B), UCMJ, AS APPLIED, VIOLATED APPELLANT'S RIGHT TO EQUAL PROTECTION OF THE LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

II

THE FAILURE OF APPELLANT'S COMMAND TO COMPLY STRICTLY WITH THE PROVISIONS OF THE COAST GUARD PERSONNEL MANUAL CONCERNING IDENTIFICATION AND TREATMENT OF APPELLANT'S ALCOHOLISM, THEREBY CONTRIBUTING SIGNIFICANTLY TO THE LIKELIHOOD THAT HE WOULD COMMIT ALCOHOL RELATED OFFENSES, REQUIRES SUBSTANTIAL SENTENCE REDUCTION PURSUANT TO THE *RATIO DECIDENDI* OF *UNITED STATES v. ROACH*, 26 M.J. 859 (C.G.C.M.R. 1988), AFF'D 29 M.J. 33 C.M.A. 1989.

I

Appellant argues that his conviction of the crime of "carnal knowledge" violates his right to equal protection under the U.S. Constitution's Fifth Amendment because the statute delineating this offense discriminates against him by making only men susceptible to prosecution and conviction. Citing *United States v. Sykes*, 11 M.J. 766 (N.M.C.M.R. 1981), *pet. denied*, 12 M.J. 106 (C.M.A.

1981), appellant further contends that, despite his failure to raise this issue at trial and despite his plea of guilty, he is not precluded from advancing this contention on appeal because it is a question of constitutional dimension. In support of this assertion, appellant asks us to compare *Menna v. New York*, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975) (counseled plea of guilty did not bar appeal alleging violation of Double Jeopardy Clause of the Fifth Amendment); *Blackledge v. Perry*, 417 U.S. 21 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974) (guilty plea did not preclude claim that indictment on a felony charge was "vindictive," where it followed the filing of an appeal of a misdemeanor conviction arising from same incident); *Country v. Parratt*, 684 F. 2d 588 (8th Cir. 1982), *cert. denied*, 459 U.S. 1043, 103 S.Ct. 461, 74 L.Ed.2d 612 (1982) (plea of no contest does not preclude a defendant from claiming the statute under which he pleaded is unconstitutional). Moreover, based on *Mathews v. de Castro*, 429 U.S. 181, 97 S.Ct. 431, 50 L.Ed.2d 389 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *United States v. Houston*, 12 M.J. 907 (N.M.C.M.R. 1982), appellant argues that although the Due Process Clause of the Fifth Amendment does not contain an Equal Protection clause, as does the Fourteenth Amendment, it provides equivalent protection from discriminating actions on the part of the Federal Government.

We concur with appellant's assertion concerning the equal protection afforded by the Fifth Amendment and we agree that he may raise the issue before this Court notwithstanding his plea of guilty and the failure to develop the constitutional challenge at the trial level. We will address the issue of whether the military offense of carnal knowledge violates appellant's right to equal protection under the fifth amendment.

Article 120(b), UCMJ, 10 U.S.C. 920(b), specifies that: "Any person subject to this chapter who, under

circumstances not amounting to rape, commits an act of sexual intercourse with a female who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct." Clearly, as asserted by appellant, this statutory provision makes only men susceptible to prosecution and conviction for the offense of carnal knowledge. Appellant acknowledges, however, that the U.S. Supreme Court in *Michael v. Superior Court of Sonoma County*, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) was confronted with a similar California statute and upheld its constitutionality in the face of the same kind of equal protection attack that the appellant has advanced with respect to Article 120(b). Notwithstanding that decision, appellant submits that his conviction should be held violative of his right to Equal Protection of the law under the Fifth Amendment in light of subsequent legislation which makes *Michael v. Superior Court of Sonoma County*, supra, readily distinguishable from the facts in this case.

Citing *U.S. v. Houston*, supra, a case involving unequal confinement facilities for women, appellant says the proper test for deciding whether gender based classification denies equal protection requires answers to two questions: (1) whether such classification serves important governmental objectives and (2) whether the gender classification is substantially related to the achievement of those objectives.

With respect to the first question, appellant submits that the government has made no showing that the gender based carnal knowledge provision in the Uniform Code of Military Justice serves any important governmental objectives. Furthermore, he contends that even if the government can establish such objectives, prosecution under the male-only military offense of carnal knowledge was not necessary in order to meet these objectives.

According to appellant, government objectives could have been met satisfactorily by charging appellant with

violation of 18 U.S.C. 2243, the gender-neutral offense of sexual abuse of a minor, which was passed by Congress in 1986 to correct an equal protection shortcoming in existing law.[1] That statute provides in pertinent part:

> (a) [Sexual Abuse] of a Minor. Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in a sexual act with another person who—
>
> > (1) has attained the age of 12 years but has not attained the age of 16 years; and
> >
> > (2) is at least four years younger than the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than five years, or both.

18 U.S.C. 2243

Appellant contends that since the alleged offense occurred in Government (Navy) housing, on board U.S. Naval Security Group Activity, Northwest, Chesapeake, Virginia, a location he says is presumptively within the "special maritime and territorial jurisdiction of the United States," he could have been charged under 18 U.S.C. 2243 pursuant to the "crimes and offenses not capital" clause of Article 134 UCMJ. *See* Part IV, par. 60c (4), MCM 1984.

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[1] The legislative history of the Sexual Abuse Act of 1986, Pub. L. 99-646, § 87(b), 10 Nov. 1986, 100 Stat. 3621 and Pub. L. 99-654, § 2, 14 Nov. 1986, 100 Stat. 3661, which is codified as 18 U.S.C. 2243, reflects the following comments from the judiciary committee's report on House of Representatives bill 4745:

> "Current Federal Law is gender-biased and incomplete in the protection it offers from sexual abuse. Only females can be victimized. . . . H.R. 4745 is drafted broadly to cover the widest possible variety of sexual abuse, and to protect both males and females from that abuse (FN41). FN41. Thus, a female can be victimized by a male or female, and a male by a male or a female. . . ."

H.R. REP. No. 99-594, 99th Cong., 2nd Sess. p. 11 & 12 (1986).

Appellant's position is that prosecution under this provision would have satisfied any legitimate objectives the Government may assert, while at the same time affording him equal protection under the Constitution and significant additional protections not provided by Article 120, UCMJ.[2] For these reasons, appellant contends we should set aside his conviction under Article 120 UCMJ as having been obtained in violation of his right to Equal Protection of the law under the Fifth Amendment to the Constitution.

In response, the Government asserts that there is no need whatsoever to make findings as to important governmental objectives in order to resolve appellant's equal protection claim. In the Government's view, this Court may summarily reject appellant's argument on the basis

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[2] In the words of appellant's brief some of the additional protections afforded by the gender-neutral 18 U.S.C. 2243 are:

> First, it creates what might be termed a "young lovers" exception, *viz.* the requirement for "at least four years" difference in ages. To illustrate, an 18 year old Coast Guard Seaman who engages in sexual intercourse with his 15 year old girlfriend may be tried and convicted under Article 120 UCMJ, for "carnal knowledge." Under 18 U.S.C. 2243, no offense has even been committed. Second, subsection, (c) of the statute specifically provides that "it is a defense, which the defendant must establish by a preponderance of the evidence, that the defendant reasonably believed that the other person had attained the age of 16 years." Contrast this with the proscription applied to the defense case under Article 120, UCMJ. "It is no defense that the accused is ignorant or misinformed as to the true age of the female . . . it is the fact of the girl's age and not his knowledge or belief which fixes criminal responsibility." Part IV ¶ 45c(2), MCM 1984. Finally, the disparity in maximum punishments is huge. As stated, 18 U.S.C.S. 2243 provides for a fine and punishment for "not more than five years, or both." The maximum punishment for "carnal knowledge" under Article 120, UCMJ, is "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years." Part IV, ¶ 45e(2), MCM 1984.

Appellate Defense Brief at p. 13.

of *Michael M. v. Superior Court of Sonoma County*, supra; and a collection of 9th Circuit Court of Appeals opinions, *U.S. v. Hicks*, 625 F.2d 216 (9th Cir., 1980), *vacated*, 450 U.S. 1036, 101 S.Ct. 1752, 68 L.Ed.2d 233 (1981), *reversed*, 657 F.2d 244 (9th Cir., 1981); *U.S. v. Sangrey*, 648 F.2d 597, (9th Cir., 1981); *Gray v. Raines*, 662 F.2d 569 (9th Cir., 1981). Both *U.S. v. Hicks*, supra and *U.S. v. Sangrey*, supra, involved prosecutions under 17 U.S.C. 2032,[3] the earlier federal statutory rape law (carnal knowledge of a female under 16) virtually identical to Article 120(b), UCMJ. *Gray v. Raines*, supra, involved a statutory rape law in Arizona. In all three cases, challenges based on a gender-based equal protection argument were rejected in summary fashion in reliance on the Supreme Court's decision in *Michael M. v. Superior Court of Sonoma County*, supra.

We agree with the Government that these cases would justify our rejection of appellant's argument without anything more. In addition, however, the Government has set forth a variety of valid important governmental objectives that could be developed in any evidentiary hearing on this matter or, in our view, may be judicially noted by this Court. For example, the Government cites the following reasons for such a statute as Article 120(b), UCMJ: minimizing the stress and trauma to military families and the military community as a whole caused by teenage pregnancy among dependent children, preventing unwanted pregnancies among dependent girls, protecting dependent girls from the physical and emotional trauma of teenage pregnancies, minimizing the risk of maternal death to dependent girls, minimizing the expense and burden to the military health care system which would result from numerous pregnant dependent children, and the military's need to police itself and thereby maintain good relations with local authorities

[3] As pointed out by the Government this is the statute replaced by 18 U.S.C. 2243 when Congress enacted the Sexual Abuse Act of 1986.

and the populace wherever armed forces may be stationed—on domestic or foreign soil.

We find the Government's argument persuasive. In evaluating this matter, we have judicially noted the worthy objectives cited by the Government as fully justifying the gender classification in Article 120(b), UCMJ. Moreover, we believe that limiting the crime of carnal knowledge to men only is substantially related to achievement of these objectives. Based on *Michael M. v. Superior Court of Sonoma County*, supra, we find Article 120(b) UCMJ to be constitutional. Accordingly, there was no need for the government to prosecute appellant under some other statute, such as 18 U.S.C. 2243. Assignment of error I is rejected.

II

In his second assignment of error, appellant submits that both the record below and his service record are replete with evidence of his alcoholism. Moreover, he contends that his superiors were aware of the problems caused by his drinking, but made at best only a half-hearted attempt to seek treatment for him. According to appellant, the command never complied with the requirements of the Coast Guard Personnel Manual in this regard. He asks us to take judicial notice of that Manual and its pertinent articles, which we will so note.

Based on his assertion that the Coast Guard failed to follow its own regulations with respect to alcohol abuse, appellant says the Coast Guard should bear some responsibility for the offenses resulting from his drinking to excess on the evening of 26 June 1989. Those offenses which he says resulted were: operating a motor vehicle while drunk, carnal knowledge, assault and battery, and indecent language to a child under 16 years of age. Appellant argues that if his command had acted responsibly and in accordance with the Personnel Manual, he would have either received the treatment he so desperately

needed or he would have been dischargd from the service well before the events of 26 June 1989. Instead, he finds himself convicted of serious offenses with substantial punishment imposed. Citing this Court's admonitions concerning command responsibilities to a known alcoholic accused in *U.S. v. Roach*, 26 M.J. 859 (CGCMR 1988), *aff'd* 29 M.J. 33 (CMA 1989), appellant submits that there should be a reassessment of the sentence and substantial reduction of the punishment.

In response, the Government, says this case is so dissimilar to *U.S. v. Roach*, supra, that any comparison between the two is inappropriate. The Government first points to the record as indicating that there was an inadequate basis for appellant's command to say that he had a drinking problem and to take the necessary steps that followed from such a determination. Furthermore, Government Counsel contends that both appellant and his counsel at trial were in accord with that view. According to the Government, it is only subsequent to trial that appellant says the command should have seen him as an alcoholic needing treatment. Accordingly, the government argues that this case is in marked contrast to the facts in *Roach*, supra, where a known alcoholic already pending administrative discharge for alcohol abuse was taken to sea rather than being left ashore for treatment awaiting the administrative discharge. Thereafter, he was allowed on liberty in Key West, simply with an order not to drink alcohol.

We concur with the Government's assessment of the differences between the instant case and the facts in *Roach*, supra. Accordingly, we find no basis for applying the rationale from *U.S. v. Roach*. Assignment II is rejected.

We have reviewed this case under the terms of Article 66, UCMJ and have determined that the findings and sentence are correct in law and fact and on the basis of the entire record should be approved. Accordingly, the

findings of guilty and sentence as approved below, are affirmed.

Judge Skor concurs.

Bridgman, Judge, (concurring):

I concur fully with the opinion of Judge Baum and agree that the result, in this case, is not inappropriate, but I am disturbed by the reach of Article 120, UCMJ, which is clearly sexually biased. Whether the retention of the military offense of carnal knowledge under Article 120, UCMJ is the deliberate choice of those entrusted with recommending and enacting changes to the Uniform Code of Military Justice, or is merely the result of oversight or neglect, it remains the law today and we are bound to apply it. However, significant changes have taken place in the armed services, and society as a whole, since enactment of the Uniform Code of Military Justice over forty years ago. I would recommend to the Code Committee established by Article 146, UCMJ, and to Congress, a reexamination of this statute and all other offenses under the UCMJ that are sexually biased.

For the Court

/s/ Jacquelyn M. Cole
Clerk of the Court

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 66238/CG
CMR Dkt. No. 939

UNITED STATES,
Appellee

v.

CARL H. SCOTT (408-31-0607),
Appellant

ORDER

On consideration of the petition for grant of review of the decision of the United States Coast Guard Court of Military Review, it is by the Court this 4th day of June, 1991

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Coast Guard Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

APPENDIX C

PART IV, PARAGRAPH 60c(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES 1984

(4) *Crimes and offenses not capital (clause 3).*

(a) *In general.* State and foreign laws are not included within the crimes and offenses not capital referred to in this clause of Article 134 and violations thereof may not be prosecuted as such except when State law becomes Federal law of local application under section 13 of title 18 of the United States Code (Federal Assimilative Crimes Act—*see* subparagraph (4)(c) below). For the purpose of court-martial jurisdiction, the laws which may be applied under clause 3 of Article 134 are divided into two groups: crimes and offenses of unlimited application (crimes which are punishable regardless where they may be committed), and crimes and offenses of local application (crimes which are punishable only if committed in areas of federal jurisdiction).

(b) *Crimes and offenses of unlimited application.* Certain noncapital crimes and offenses prohibited by the United States Code are made applicable under clause 3 of Article 134 to all persons subject to the code regardless where the wrongful act or omission occurred. Examples include: counterfeiting (18 U.S.C. § 471), and various frauds against the Government not covered by Article 132.

(c) *Crimes and offenses of local application.*

(i) *In general.* A person subject to the code may not be punished under clause 3 of Article 134 for an offense that occurred in a place where the law in question did not apply. For example, a person may not be punished under clause 3 of Article 134 when the act occurred in a foreign country merely because that act would have been an offense under the United States Code had the act occurred in the United States. Regardless where com-

mitted, such an act might be punishable under clauses 1 or 2 of Article 134. There are two types of congressional enactments of local application: specific federal statutes (defining particular crimes), and a general federal statute, the Federal Assimilative Crimes Act (which adopts certain state criminal laws).

(ii) *Federal Assimilative Crimes Act (18 U.S.C. § 13).* The Federal Assimilative Crimes Act is an adoption by Congress of state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed. The Act applies to state laws validly existing at the time of the offense without regard to when these laws were enacted, whether before or after passage of the Act, and whether before or after the acquisition of the land where the offense was committed. For example, if a person committed an act on a military installation in the United States at a certain location over which the United States had either exclusive or concurrent jurisdiction, and it was not an offense specifically defined by federal law (including the UCMJ), that person could be punished for that act by a court-martial if it was a violation of a noncapital offense under the law of the State where the military installation was located. This is possible because the Act adopts the criminal law of the state wherein the military installation is located and applies it as though it were federal law. The text of the Act is as follows:

Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

APPENDIX D

PART IV, PARAGRAPH 45c(2), e(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES 1984

Article 120—Rape and carnal knowledge

c.(2) *Carnal knowledge.* "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a female who is not the accused's wife and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is no defense that the accused is ignorant or misinformed as to the true age of the female, or that she was of prior unchaste character; it is the fact of the girl's age and not his knowledge or belief which fixes his criminal responsibility. Evidence of these matters should, however, be considered in determining an appropriate sentence.

e. *Maximum punishment.*

(1) Rape. . .

(2) *Carnal Knowledge.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

APPENDIX E

Archives of Sexual Behavior, Vol. 16, No. 5, 1987

Parameters of Sexual Contact of Boys with Women

Sylvia Robbins Condy, Ph.D., Donald I. Templer, Ph.D., Ric Brown, Ed.D., and Lelia Veaco, Ed.D.

The incidence of sexual contact with boys by women was found more prevalent than had been contended in the clinical literature. Male penitentiary inmates reported higher heterosexual contact as children than did college men. The effects upon the boy and his later adult sex life were generally reported as not traumatic, although coercion by the woman tended to be associated with a bad feeling about the experience at the time and a negative effect upon adult sex life. The majority of women were friends, neighbors, baby sitters and strangers to the boy. Intercourse and genital touching were the predominant forms of sexual activity. Prison women who reported having such contact were significantly higher than the prison women who did not report contact on the Mini-Mult Schizophrenia and Hypomania scales and significantly lower on the Lie scale. Educational levels of the men and their parents were inversely associated with history of sexual contact.

INTRODUCTION

The purpose of this research was to determine the parameters of heterosexual contact of boys. A number of authors have offered the clinical impression that the incidence of male child sex abuse is rare (e.g., Finkelhor, 1979; Meiselman, 1979; Stoller, 1975). However, some clinicians have maintained that it occasionally occurs, and case reports have appeared in the literature (e.g.,

Shengold, 1980; Sarrell and Masters, 1982; Groth, 1979). Opinions regarding the effect of such molestation and regarding the characteristics of the women who have molested have been offered (Sarrel and Masters, 1982; Kempe, 1980).

Unfortunately, all of the above opinions and reports are based upon clinical impression rather than systematic investigation. There have apparently been only two articles that are based upon what could be described as research. A serendipitous finding of Petrovich and Templer (1984) was that 49 (59%) of 83 prisoners convicted of rape as adults reported heterosexual experiences before the age of 16 with a female at least 5 years older. The boys were a mean age of 11.5 years at the time of the sexual activity. The acts were primarily sexual intercourse and usually occurred on more than one occasion. Petrovich and Templer (1984) stated that they did not know whether the high prior sexual experience rate of convicted rapists was a function of their socioeconomic status (SES), being rapists, being sex criminals more generally, or being criminals in general.

Fritz *et al.* (1981) administered a questionnaire to 952 college students regarding sexual molestation as children and found that 7.7% of the women and 4.8% of the men reported they had been molested. The ratio of heterosexual to homosexual molestation for the men was 3:2. However, the inferences permitted from the Fritz *et al.* (1981) findings and the Petrovich and Templer (1984) findings are limited by the scope of these investigations and by the restricted nature of the subjects used.

Our purposes were (i) to further extend the gross perspective with respect to incidence of heterosexual contact of boys, (ii) to explore the nature of this experience, (iii) to explore the characteristics of women who have sexual contact with younger males, and (iv) to explore the apparent effects of the early experience upon the boys.

METHOD

Subjects

There were a total of 571 male subjects in the study. Three-hundred fifty-nine were male college students at three state universities and one community college. The other 212 male subjects were inmates in a medium-security prison. The group of 212 inmates comprised three separate groups: (i) 65 convicted rapists, (ii) 92 convicted child-molesters, and (iii) 55 inmates convicted on nonsex crimes. There was a total of 797 female subjects in the study. Six-hundred twenty-five were college students in three state universities and one community college. The other 172 female subjects were medium-security prison prison inmates who had been convicted of various crimes. Table I displays the subjects' age, education and ethnicity.

Procedures

The male and female college subjects were obtained by speaking to the various instructors in universities and colleges, obtaining permission to address their classes and administer the questionnaires. The male prison sample was selected by reviewing the records of 1200 prisoners in a medium-security prison. Men were selected who had been convicted of either rape, child molestation, or nonsex crimes, but not a crime in one of the other two categories. The child-molesters were selected because they constitute the largest sex-offense group next to the rapists. Also, men who had participated in the Petrovich and Templer (1984) study were not selected, so as to utilize a completely different subject pool. Four-hundred fifty men were selected, and requests were sent to them to appear at a classroom during a specified time. When the men arrived, they were informed of the nature of the study, assured of anonymity, and given the opportunity to decline to participate. Three-hundred men came to the classroom, and 86 declined to participate.

The female prison population was notified of the research through an organization of politically active prisoners, by visitation of the senior author to the classrooms, and by a notice posted in the library. The women were assured of anonymity. One-hundred seventy-two prison women participated in the study.

All subjects were administered anonymous questionnaires pertaining to demographic information and the phenomenon under consideration. The key question for the males was: "Before you were 16 years old, did you ever have sexual contact with a woman or girl who was 5 years or more older than yourself, and at least 16 years of age?" The key question for females was: "Did you ever have sexual contact with a boy before he was 16 years old, when you were 5 years or more older than he, and at least 16 years old?" Both male and female subjects were asked how many times such an experience occurred, with how many partners, the age of the two involved persons at the time, the nature of the sex act (intercourse, oral sex, or genital touching), the relationship of the two partipants, and the type of coercion used to initiate the sexual activity. The females were also asked, "Did you have sex with a man or boy at least 5 years older than you and 16 years of age before you were 16? If that answer was affirmative, the relationship of the man or boy to the subject, plus her age and his age at the time were asked. The female inmates were also asked to complete the 71-item Mini-Mult, an abbreviated form of the MMPI (Kincannon, 1968).

Table II shows the numbers and percentages of the male subjects who reported sexual contact before the age of 16 with an older female. There was a trend ($x^2 = 5, 84$, $p < .06$) for the rapist to report more sexual contact than the nonsex offenders who reported more than the child-molesters. Table II also shows the numbers and percentages of the female subjects who reported sexual contact with a boy. In addition, Table II indicates,

for the subjects who reported sexual contact, the numbers and percentages of those subjects who reported more than one experience, and the numbers and percentages of those subjects who reported more than one partner.

Table III displays the mean age at which the boys were first sexually involved. For the male reports there is only one "case" per subject. If there was more than one incident, the age of first occurrence is used. For the female subjects, in Table III, there is also as many cases as number of boys. The age of first incident with each boy is used. Table III also displays the mean age of the women at the time of first contact for each boy. The means reported by the females are not completely analogous to the means reported by the males, since a boy could conceivably have had contact with a woman prior to the first contact reported by the female subject. The frequency distribution of ages that the 154 men reported at the time of contact was 1 for age 3, 5 for age 5, 3 for age 6, 4 for age 8, 5 for age 9, 9 for age 10, 10 for age 11, 15 for age 12, 27 for age 13, 37 for age 14, and 38 for age 15. It is apparent that the distribution is skewed toward the higher ages. The median age is 13 and the mode is 15.

Table IV pertains to the activities at the time of the sexual experience. Table IV shows the nature of the sex acts, including (i) intercourse, (ii) oral sex, and/or (iii) genital touching, as reported by the sexually involved male and the sexually involved female. As can be seen, intercourse and genital touching were reported more often by all groups than oral sex. The total percentages add to more than 100% in Table IV and V because the categories or responses are not mutually exclusive.

Table IV displays the type of coercion used to instigate the sexual contact, as reported by female and male. The four categories are female wanted to, male agreed; male wanted to, female agreed; female forced male; and male forced female.

Table V shows the relationship of the sexually involved female to the sexually involved male as reported by both the male and female populations. Ten relationships are listed: mother, aunt, cousin, sister, grandmother, friend, neighbor, teacher, baby sitter, and stranger. The target categories of relationships are those of friend and neighbor. Next are the categories of babysitter and stranger.

Table VI shows the number of percentages of the sexually involved male population that reported feeling "good," "bad," or "mixed," about a sexual experience with an older female. The categories of response for the reported effect on their adult sex life were "good," "bad," "no effect," and "mixed." These percentages do not add up to 100% as these categories are not mutually exclusive, and men with multiple experiences reported varied reactions to each experience. Some subjects reporting a single incident indicated they felt both good and bad about the experience, while others did not indicate how they felt about the experience at all. It is apparent that the good feelings were reported as more prevalent than the bad feelings at the time of the incident. It is also apparent that with the exception of the child-molesters, the experience was regarded as having more of a good than a bad effect on their adult sex lives.

Table VII provides the point biserial correlations of feeling at the time of the incident and of effect upon adult sex life with age at the time and with type of coercion used. Age was not significantly related to either effect variable, although there was a trend ($p = 0.07$) for experience at a younger age to be associated with a negative effect on adult sex life. It is apparent that both the condition of "female wanted to, male agreed" coercion and "male wanted to, female agreed" coercion were associated with reported favorable feelings at the time and reported favorable effect on adult sex life. If the boy was forced the feeling at the time and the effect on adult sex life were reported as unfavorable.

The feeling at time of contact was reported as positive if the relationship to the boy was friend ($t = 2.42$, $p < 0.05$). The feeling was reported as negative if the relationship was that of mother ($t = 2.47$, $p < 0.05$), aunt ($t = 2.16$, $p < .05$), or sister ($t = 2.21$, $p < 0.05$). Feeling at the time was not significantly related to other relationships.

The effect on adult sex life was reported as negative if the relationship to the boy was that of aunt ($t = 2.41$, $p < 0.05$). The reported effects on adult sex life were not significant for the other relationships.

Table VIII shows the Mini-Mult means and standard deviations for the female prisoners who reported contact and those who did not report contact. The sexually involved women were significantly higher than the non-sexually involved women on the Schizophrenia and Hypomania Scales, and significantly lower on the Lie Scale.

The women who had contact with the boys were more likely to have had early sexual experiences themselves. Specifically, 13 (81%) of the 16 women reporting contact, had early heterosexual experiences as children, and 115 (21%) of the 558 noninvolved women were sexually involved as children ($x^2 = 29.60$, $p < 0.001$). The mean age of the woman when she was sexually involved was 13.01 (SD = 7.6, range 3-15). The mean age of her sexual partner was 23.54 (SD — 7.6, 16-60). For the college women, friends accounted for 87% of the experiences, while neighbors, strangers, fathers, cousins and brothers accounted for 7-10%. The relationship of the male to the sexually involved prison women was somewhat different, although, as with college women, friends acounted for 96% of the contact. Fathers, neighbors, and strangers accounted for 9-12% of the contact, somewhat higher than reported by college women.

Table IX displays the point biserial correlations between involvement status of the male subjects and num-

ber of years formal education of themselves and their parents.

The number of college females who reported involvement ($n = 3$) was too small for meaningful correlations with education. However, the differences in mean education between those who molested and those who did not were not significant for the college women ($t = 0.86$), their mothers ($t = 1.25$), or their fathers ($t = 1.56$). The comparable mean differences for the prison women and the total female group did not approach significance.

DISCUSSION

The findings indicate that heterosexual activity among boys does not appear to be the rarity that some sexology authorities had previously believed (Barry, 1965; Diamond and Karlen, 1980; Finkelhor and Russell, 1984; Halleck, 1965; Kubo, 1959; Lukianowicz, 1972; Malinowski, 1927; Meiselman, 1978; Paulson, 1978; Sarafino, 1979; Stark, 1984; Stoller, 1975). Although the difference among the incidence in the three types of male prisoners approached significance, the important finding is that a higher incidence of reported heterosexual contact is not confined to rapists. In the present study, sexual involvement was also high in child-molesters and inmates with crimes that are not of a sexual nature. It appears that such reported contact is high in inmates in general. One author (Glueck, 1956) maintained sex offenders reported older women had been their first heterosexual partners. However, this was a clinical impression. Furthermore, the age of the prisoner at the time of the sexual activity was not mentioned or whether or not the males were minors.

In every category of respondent in this study, for those subjects who reported sexual contact with a female, in at least half of the sexual encounters intercourse was involved. The nature of the sex acts of older females with boys appears not to have been addressed previously in

the literature, except by Petrovich and Templer (1984). They noted that the high incidence of intercourse contrasts to the usual absence of penetration when the heterosexual child-molesters are male. The reason for the different incidences of intercourse are not clear, but could be related to various factors. There may be differences in personality between male and female involved or differences in their interpersonal interaction with the contacted children. Possibly relevant is the positively skewed age distribution for the molested boys. It is here conjectured that the psychological nature of heterosexual contact by females could be more characterized as an extension of the lower end of the age distribution for adult male-female sexual relationships, in contrast to the qualitatively different sort of psychosexual relationship that ordinarily occurs when a molester is a male. An alternate explanation is that although prepubescent vaginal size would ordinarily make penetration by an adult male difficult, the prepubescent penile size would actually be less structurally prohibitive of penetration (Bridge, personal communication, May 26, 1985).

Another variable considered by previous authors to be important in the long-term psychological effect on a boy of sexual experience with an older woman was the relationship of the woman to the boy (Adams-Tucker, 1981; Finkelhor, 1979; Halleck, 1965, Master, 1963; Sarrel & Masters, 1982; Tierney and Corwin, 1983; Yorukoglu and Kemph, 1980). The findings of the present study support this position insofar as the men who had sexual experiences with their mothers, aunt, and sisters, reported "bad feelings" at the time of the incident significantly more often than those who did not have such experiences with these women. Sexual experiences with aunts reportedly had a "bad" effect on the victim's adult sex lives.

Among both the college and the prison men, there were far more respondents indicating that the sexual exper-

ience was good than those who regarded it as bad. The preponderance of respondents also regarded it as having a good rather than a bad effect on their adult sex lives. This is consistent with the male reporting in the college students survey of Fritz *et al.* (1981), but in contrast to the reports in the literature of females maintaing their being heterosexually involved in childhood was traumatic and had deleterious effects upon their adult sex lives (Adams-Tucker, 1982; Finkelhor, 1979). Perhaps the difference is a function of the double-standard in our society which forbids sexual activity more strenuously in girls than in boys.

An alternative, although not a mutually exclusive explanation, is that something about the initiation or process of the sex activity is less stressful than when men molest girls. As indicated in Table VI, in only a rather small minority of the cases did the male report being forced. In a much larger proportion of the cases, the male actually reported initiating the activity. Furthermore, the present research found that the men tended to report the experience as negative if they were forced and positive if they were not forced. This is consistent with the contention of previous authors that the most influential factor in a traumatic sexual event for a child is the type of coercion (Finkelhor, 1979; Groth, 1979; Sarrel & Masters, 1982).

The significantly higher evaluations on the Mini-Mult Schizophrenia, and Hypomania Scales obtained by those prison women who were involved with young males as compared to those who were not, probably should not be viewed as surprising. Elevations on these scales are frequently associated with unconventional life styles and socially inappropriate behavior. And sexual contact with a minor is defined by society as deviant behavior. Furthermore, the higher recorded incidence of contact by prison women than by college women ($x^2 = 18.2$, $p < 0.001$) is also congruent with such an inference, al-

though differences in age or other variables such as socio-economic status could account for this difference.

Nevertheless, the bulk of the evidence does not point to psychosis in the typical involved woman as some clinicians have maintained or suggested (Frances and Frances, 1976; Kempe, 1980; Yorukoglu and Kemph, 1980). The F Scale and the "psychotic tetrad" (Paranoia, Psychathenia, Schizophrenia, and Hypomania Scales) are not as highly elevated in the involved prison women as these scales ordinarily are in psychotic psychiatric patients. Also, the Schizophrenia and Hypomania Scale means of the involved prison women were less than 1 standard deviation higher than the means of the other prison women. Perhaps a reasonable generalization about females who have sexual contact with boys is that they are atypical persons, but further research is needed to clarify their personality and psychopathological characteristics.

Further clarification of the characteristics of women who are involved can be generated from the finding that the women were significantly more likely to have been sexually involved with an older male when they were under the age of 16. Groth (1984) suggested that molestation of children by adults is learned in childhood. It is possible that some sort of cause-and-effect phenomenon exists. It is also possible that personality characteristics such as extraversion lead to both the contact of some females and their sexual behavior. It is also conceivable that the same social milieu that leads to one sort of incident leads to another.

If social milieu is relevant, perhaps it is one of low SES. The significant, albeit low, inverse correlations between education and males having been involved are consistent with some of the clinical literature (Fluegel, 1926; Guttmacher, 1951; Paulson, 1978; Rhinehart, 1961; Riemer, 1940) that suggested the occurrence of sexual

molestation of children tends to be associated with lower socioeconomic status. Some authors have conjectured that sexual molestation is more common in poor working-class and rural groups where poverty, inadequate housing, crowding and poor sanitary facilities lead to an enforced physical proximity in the absence of good opportunities for emotional investment outside the family. Other authors added the factors of poorly supervised home settings, disorganization, and homes broken by divorce to the low SES factors associated with sexual abuse of boys (Brant and Tisza, 1977; Renshaw and Renshaw, 1980; Weeks, 1976).

It is not possible to say on the basis of the present research whether the inverse education-sexual experience correlations reflect the importance of lower social status; or lower intelligence, or lower economic standing or a combination of such variables. Even though the significance of the interpretation of these findings awaits further research, the basic findings are consistent with the well-established generalizations that acting out and illegal behaviors seem more common among less privileged segments of society.

A limitation of the present research is that it is based entirely upon self-report without external verification. Furthermore, our subjects included inmates, and criminals are not generally regarded as honest persons. However, these limitations appear to weigh less heavily in view of the very good internal consistency. The reports of college men, prison men, college women, and prison women converge well with respect to the nature of the sex acts, the initiation of the sex acts, the type of coercion, and the relationship between the involved male and female.

There was a larger percentage of males who reported being sexually involved than females who reported sexual experience with male minors. However, this discrepancy

could possibly be accounted for by a substantial number of women reporting having been involved with more than one boy, in addition to the fact that all of the males in the study are now past 16 and the females are primarily young women and theoretically have potential for more incidences of sexual involvement with minor males.

TABLE II. Number and Percentage of Males Who Reported Early Sexual Contact and Females Who Were Involved in Early Sexual Contact with Younger Males

	Reporting early Sexual Contact			Reporting » 1 Sexual Contact		Reporting » 1 Partner	
Subjects	N	n	%	n	%	n	%
College men	359	57	15.88	45	78.95	28	49.12
Prison men	212	97	45.75	85	87.63	69	71.13
Convicted rapists	65	37	56.92	35	94.60	31	83.78
Convicted Child-molesters	92	34	36.96	26	76.47	22	64.71
Convicted Non sex offenders	55	26	47.27	24	92.31	16	61.54
College women	638	3	0.48	1	33.33	0	0
Prison women	172	13	7.56	8	61.54	6	46.15

TABLE III. Age of Boys and Women at Time of First Sexual Contact of Boys as Reported by the Males and as Reported by the Females

		Mean age of boy at time first sexual experience occurred			Mean age of woman at time first contact occurred		
Subjects	N	X	SD	Range	X	SD	Range
College men	57	12.53	2.59	6-15	22.60	6.18	16-46
Prison men	97	12.63	2.60	3-15	25.24	5.83	16-61
Rapists	37	13.16	2.26	5-15	26.27	5.23	16-48
Child-molesters	34	11.35	3.01	3-15	24.80	6.08	16-43
Non sex offenders	26	13.54	1.77	8-15	24.35	6.32	16-61
College women	3	14.67	0.58	14-15	26.00	11.27	19-39
Prison women	13	13.70	0.80	13-15	19.44	2.64	18-32

TABLE I. Age, Education and Ethnicity of Subjects

						Ethnicity									
	AGE			EDUCATION		ASIAN		BLACK		HISPANIC		AM. INDIAN		WHITE	
Group	N	X	SD	X	SD	n	%	n	%	n	%	n	%	n	%
College men	359	24.30	7.05	14.29	1.02	25	7.0	23	6.4	51	14.2	4	1.1	256	71.3
Prison men	212	35.05	10.71	11.85	2.66	2	0.9	50	23.5	28	13.2	6	2.8	126	59.3
Rapists	65	29.65	7.63	11.44	3.01	0	0	25	38.5	10	15.4	1	1.5	29	44.6
Child molesters	92	41.12	13.70	11.78	2.58	2	2.2	8	8.7	7	7.6	3	3.3	72	78.2
Non sex offenders	55	34.38	10.61	12.36	2.38	0	0	17	30.9	11	20.0	2	3.6	25	45.5
College women	625	25.34	6.88	13.87	1.59	25	4.01	56	9.0	132	21.1	4	.6	408	65.3
Prison women	172	30.68	7.37	12.43	2.02	2	1.2	52	30.2	36	20.9	6	3.5	70	44.2

TABLE IV. Nature of the Sex Acts and Type of Coercion as Reported by Male and Female

	NATURE OF SEX ACT							TYPE OF COERCION							
	Intercourse			Oral Sex		Genital Touching		Female wanted to male agreed		Male wanted to female agreed		Female forced male		Male forced female	
Subjects	N	n	%	n	%	n	%	n	%	n	%	n	%	n	%
College men	57	39	68.42	30	52.63	48	84.21	38	66.67	28	49.12	8	14.04	4	7.02
Prison men	97	80	82.47	60	61.86	79	81.44	80	82.47	53	54.64	11	11.34	3	3.09
Rapists	37	33	89.19	21	56.76	29	78.38	30	81.08	21	56.76	7	18.92	2	5.41
Child molesters	34	23	67.65	22	64.71	28	82.35	29	85.29	14	41.18	4	11.76	1	2.94
Non sex offenders	26	22	84.62	16	61.54	20	76.92	19	73.08	18	69.23	0	0	0	0
College women	3	3	100.00	0	0	2	66.67	3	100.00	3	100.00	0	0	0	0
Prison women	13	11	84.62	11	84.62	13	100.00	7	53.85	11	84.62	2	15.38	2	15.38

TABLE V. Relationship of Sexually Involved Female to Sexually

Subjects	N	Mother		Aunt		Cousin		Sister		Gra
		n	%	n	%	n	%	n	%	n
College men	57	3	5.26	6	10.53	1	1.75	1	1.75	2
Prison men	97	3	3.09	5	5.15	18	18.56	4	4.12	2
Rapists	37	1	2.70	2	5.40	8	21.62	1	2.70	0
Child molesters	34	2	5.88	3	8.82	7	20.59	1	2.94	2
Non sex offenders	26	0	0	0	0	3	11.54	1	3.85	0
College women	3	0	0	0	0	0	0	0	0	0
Prison women	13	0	0	0	0	1	7.69	0	0	0

volved Male

dmother		Friend		Neighbor		Teacher		Baby sitter		Stranger	
%	n	%	n	%	n	%	n	%	n	%	
3.51	29	50.88	21	36.84	4	7.02	14	24.56	12	21.05	
2.06	63	64.95	40	41.24	12	12.37	23	23.71	20	20.62	
0	26	70.27	12	32.43	5	13.51	8	21.62	7	18.92	
5.88	20	56.62	15	44.12	5	14.71	11	32.35	6	17.65	
0	16	61.54	12	46.15	2	7.69	3	11.54	7	26.92	
0	2	66.67	1	33.33	0	0	0	0	0	0	
0	10	76.92	6	46.15	0	0	0	0	2	15.39	

TABLE VII. Point Biserial Correlations Between Type of Coercion and Feeling at Time and Effect on Adult Sex Life[a]

Variables at time of molestation	Feeling at time	Effect on adult sex life
Age of boy	−0.11	−0.19
Coercion		
1. Male wanted to, female agreed	− .15[b]	− .22[b]
2. Female wanted to, male agreed	− .23[b]	− .23[b]
3. Male forced female	− .02	.09
4. Female forced male	− .30[c]	.40[d]

[a] 1 = good effect; 2 = mixed effect (both good and bad checked); 3 = bad effect.
[b] $p < 0.05$.
[c] $p < 0.01$.
[d] $p < 0.001$.

TABLE VIII. Mini-Mult Scale Means of Prison Women Reporting and Those Not Reporting Sexual Involvement

	Women who Reported Involvement (n=13)			Women who Did Not Report Involvement (n=101)		
Mini-Mult Scale	T score	Raw score	SD	T score	Raw score	SD
L(Lie)	46	2.92[a]	1.04	53	5.11[a]	2.05
F(Infrequency)	62	7.62	2.73	60	7.37	4.16
K(Correction)	48	11.08	2.53	49	12.15	3.47
Hs(Hypochondriasis)	54	15.08	5.19	52	14.37	4.69
D(Depression)	63	25.77	5.82	57	22.96	5.36
Hy(Conversion Hysteria)	57	22.85	5.01	54	21.25	6.96
Pd(Psychopathic deviate)	76	29.77	4.75	69	27.21	6.84
Pa(Paranoia)	62	12.08	3.43	62	12.22	7.50
Pt(Psychasthenia)	58	30.08	6.47	53	26.88	7.46
Sc(Schizophrenia)	72	37.00[a]	8.51	64	31.82[a]	8.07
Ma(Hypomania)	68	24.23[a]	4.90	63	21.58[a]	3.35

[a] Significant difference, $p < .05$.

TABLE IX. Point Biserial Correlations Between Involved Status of Males and Years of Formal Education[a]

Male Subjects	N	EDUCATION		
		Self	Father	Mother
College Men	359	.11[b]	—.00	—.01
Prison Men	212	.15[b]	.10	.15[b]
Rapists	65	.11	.22	.13
Child-molesters	92	.22[b]	.11	.24[b]
Non sex offenders	55	.03	.02	—.14
Total	571	.28[c]	.16[c]	.16[c]

[a] 1 = involved; 2 = not involved.
[b] $p < 0.05$.
[c] $p < 0.0001$.

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TABLE VI. Feelings about the Experience and Effect on Adult Sex Life as Reported by Involved Men

	College men (n=57)		Total prison men (n=97)		Rapists (n=37)		Child-Molesters (n=34)		Non sex offenders (n=26)	
	n	%	n	%	n	%	%	n	n	%
Feelings										
Good	29	50.88	64	65.98	25	67.57	17	50.00	22	84.62
Bad	14	24.56	6	6.19	1	2.70	3	8.82	1	3.85
Mixed	7	12.28	24	27.74	11	29.73	10	29.41	3	11.54
Effect on adult sex life:										
Good	21	36.84	42	43.30	17	45.95	6	17.65	19	73.08
Bad	9	15.79	21	21.65	6	16.22	13	38.24	1	3.85
None	16	28.07	21	21.65	8	21.62	7	20.59	5	19.23
Mixed	5	8.77	10	10.31	6	16.22	4	11.76	0	0